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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LAMAR JOHNSON, Defendant and Appellant.	A152220 (San Mateo County Super. Ct. Nos. CIV-506664, CIV-530171)

Defendant Lamar Johnson was involuntarily committed to a state mental hospital after a jury determined he was a sexually violent predator (SVP) within the meaning of the Sexually Violent Predator Act (SVPA).[1] He appealed, arguing that the jury's finding could not stand and the SVPA is unconstitutional, and filed two petitions for a writ of habeas corpus, arguing that his psychiatric diagnosis of paraphilic coercive disorder could not support a commitment. In 2015, we affirmed the judgment and denied the habeas petitions. (*People v. Johnson* (2015) 235 Cal.App.4th 80, 83 (*Johnson I*).)

In this appeal, Johnson challenges an August 2017 order denying his petition for conditional release under section 6608, contending that (1) insufficient evidence supports the trial court's determination he would be a danger to others if under supervision and treatment in the community; (2) the trial court erred by admitting evidence that he failed a polygraph test; (3) the court applied the wrong burden of proof; and (4) cumulative

[1] Welfare and Institutions Code section 6600 et sequitur. All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

error requires reversal. We need not address these claims because, after the appeal was briefed, Johnson was granted conditional release based on a subsequent section 6608 petition. We therefore dismiss the appeal as moot.

I.
BACKGROUND

A. Johnson's Offenses and the Original Commitment.

"Between 1983 and 1992, Johnson committed sexually violent offenses against three victims. In 1984, he pleaded guilty to one count of assault with intent to commit rape (Pen. Code, §§ 220, 261) of a 24-year-old woman. While he was awaiting sentencing for that crime, he raped a 15-year-old girl who lived in his apartment complex, and he later pleaded guilty to unlawful sexual intercourse with a minor (Pen. Code, § 261.5). He served time in prison for those two convictions but was released on parole in May 1985. In March 1992, Johnson sexually assaulted yet another woman, and he was subsequently convicted of two counts of rape (Pen. Code, § 261, subd. (a)) and one count each of assault with intent to commit sodomy (Pen. Code, §§ 220, 286), forcible oral copulation (Pen. Code, § 288a), and assault with intent to commit rape (Pen. Code, §§ 220, 261). He was sentenced to state prison for 36 years and remained incarcerated for over 17 years, but he was scheduled to be released on parole on June 28, 2011." (*Johnson I*, *supra*, 235 Cal.App.4th at p. 85.)

Before his release, the San Mateo County District Attorney petitioned to have Johnson committed to a state hospital as an SVP. (*Johnson I*, *supra*, 235 Cal.App.4th at p. 85.) The SVPA provides for involuntary commitment to a state mental hospital for an indefinite term of any individual whom a jury unanimously finds beyond a reasonable doubt to be a "sexually violent predator." (§§ 6603, subd. (f), 6604.) An SVP is defined as "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).)

At trial, the People's experts testified that they had "diagnosed Johnson with 'paraphilia[,] not otherwise specified, . . . with non-consenting persons,' " otherwise known as paraphilic coercive disorder. (*Johnson I*, *supra*, 235 Cal.App.4th at p. 85.) As described by these experts, the disorder is "marked by sexual arousal or gratification involving nonconsenting persons persisting over a six-month period." (*Ibid.*) Johnson presented the testimony of experts who opined that the disorder is very rare, if it even exists, and that he did not have it. (*Id.* at p. 86.) "The experts also disagreed about Johnson's risk of engaging in sexual violence if released," with the People's experts concluding he was in a group that had a 21 to 28 percent chance of recidivism over the next 10 years and his experts concluding he was in a group that had a less than seven percent chance of reoffending over the next five years. (*Id.* at pp. 86–87.) "The jury unanimously found Johnson to be an SVP, . . . the trial court imposed an indeterminate commitment," and we affirmed. (*Id.* at pp. 87, 92.)

B. The Petitions for Conditional Release.

1. The governing law.

"SVPs are entitled to have their mental conditions examined once per year (§ 6604.9, subd. (a)), and they can obtain [conditional] release in two ways. First, if the State Department of State Hospitals (DSH) determines that the SVP's diagnosed mental disorder 'has so changed that the person is not likely to commit acts of predatory sexual violence while under supervision and treatment in the community,' the DSH must forward a report and recommendation for conditional release, and the trial court must set a hearing to consider conditional release. (§ 6607, subd. (a).) Second, the SVP may petition the court for a conditional release with or without the concurrence of the DSH. (§ 6608, subd. (a).) Upon receiving a petition filed without the DSH's concurrence, the court 'shall endeavor whenever possible to review the petition and determine if it is based on frivolous grounds and, if so, shall deny the petition without a hearing.' (*Ibid.*) If the court determines the petition is not frivolous, it must set a hearing. (§ 6608, subds. (b)(1) & (4), (c)(1).)" (*Johnson I, supra*, 235 Cal.App.4th at p. 84.)

At a hearing on an SVP's conditional release, the trial court must determine whether "it is likely that [the committed person] will engage in sexually violent criminal behavior due to his or her diagnosed mental disorder if under supervision and treatment in the community." (§ 6608, subd. (g).) "If the court at the hearing determines that the committed person would not be a danger to others due to his or her diagnosed mental disorder while under supervision and treatment in the community, the court shall order the committed person placed with an appropriate forensic conditional release program operated by the state for one year." (*Ibid.*) Where, as here, the DSH does not agree that conditional release is appropriate, "the committed person shall have the burden of proof by a preponderance of the evidence." (§ 6608, subd. (k).) "If the SVP's petition is denied, the SVP may not file a new application until one year has elapsed from the date of the denial. (§ 6608, subd. (j).)" (*Johnson I, supra,* 235 Cal.App.4th at p. 84.)

2. The petition giving rise to this appeal.

In August 2014, Johnson filed a petition for conditional release without the DSH's concurrence under section 6608, subdivision (a).[2] The trial court determined that Johnson was entitled to a hearing on the petition, which due to numerous continuances did not begin until May 2017. Johnson presented expert testimony that he did not have paraphilic coercive disorder and, even if he did, that he had a low risk of reoffending if released under supervision into the community. Among other positive factors, the experts cited Johnson's success in the state hospital's treatment program, his family support, and his advancing age.

The People presented expert testimony that Johnson was not an appropriate candidate for conditional release because he had not completed all the modules of the state hospital's treatment program, which is generally required for acceptance into the conditional release program. The experts also relied on Johnson's failure to accept full

[2] Johnson also sought unconditional discharge under section 6605, but the trial court concluded he was not entitled to seek such relief under Senate Bill No. 295 (2013–2014 Reg. Sess.), which went into effect before he filed his petition and requires the DSH's concurrence in order to seek unconditional discharge. (See § 6604.9, subd. (d).)

responsibility for his crimes, complete certain testing (including polygraph testing), and obtain approval of his release plan. The only one of these experts to base an opinion on Johnson's risk of recidivism, as opposed to his failure to complete treatment, placed him in a group of offenders that had a 14 percent recidivism rate over five years. In August 2017, primarily relying on this expert's testimony, the trial court denied the petition for conditional release. Johnson appealed.

3. The subsequent petition.

Meanwhile, in March 2018, Johnson filed another petition for conditional release. Shortly after this appeal was fully briefed, we learned that on August 30, 2018, the trial court granted this petition and ordered Johnson's conditional release, based on its finding that he would not pose a sufficient danger to the public. In November, we requested and received supplemental briefing from the parties on whether the August 30 order rendered this appeal moot.[3] The Attorney General claimed it did, but Johnson claimed it did not, pointing out that the People intended to file a motion for reconsideration of the order for conditional release.

On January 29, 2019, Johnson filed a petition for a writ of prohibition in this court, No. A156316, averring that the People filed their anticipated reconsideration motion on December 18, 2018, and requesting that the trial court be ordered to deny the motion. We denied the writ petition without prejudice, in part on the basis that it was premature because the trial court had not yet ruled on the reconsideration motion.

But the reconsideration motion remained pending, and on May 14, 2019, we ordered the parties to update this court on the status of the motion and any other matters bearing on whether this appeal is moot. Based on the information we received, it appears that the motion was not decided earlier due to unforeseen circumstances, including a personal matter requiring the assignment of a different judge to the case. On June 10, acting with commendable speed, the recently reassigned judge denied the motion for

[3] We also gave notice of our intent to take judicial notice of the August 30 order, to which neither party objected, and we hereby grant our own motion. (See Evid. Code, §§ 452, subd. (d), 455, subd. (a), 459, subd. (c).)

reconsideration, as well as the People's oral motion to stay. On June 17, the court gave notice to the community program director and ordered Johnson released within 30 days.[4] At oral argument on August 7, Johnson's counsel informed us that his client has not yet been released, pending the preparation of reports to assist in determining Johnson's placement.

II.
DISCUSSION

Johnson argues that even though he has now been granted conditional release, this appeal is not moot. We are not persuaded.

"An appeal becomes moot when, through no fault of the respondent, the occurrence of an event renders it impossible for the appellate court to grant the appellant effective relief." (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1404.) In particular, this is true if the appellant "has already received the relief he [or she] seeks" on appeal. (*People v. Gregerson* (2011) 202 Cal.App.4th 306, 321.) The trial court has granted Johnson's subsequent petition for conditional release and denied the People's motion for reconsideration of that ruling, and thus there is no effective relief we can provide.

Johnson argues that even though the trial court ordered his conditional release, this appeal will not become moot until he is actually released from the state hospital. He provides no authority to support this position, however, and we disagree that a legal ruling must be fully implemented before it can render another controversy moot.

At oral argument, Johnson's counsel urged us to apply an exception to the mootness doctrine that allows us to consider an otherwise moot appeal when it "presents important issues that are 'capable of repetition, yet evading review.' " (*Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122; see *People v. Cheek* (2001) 25 Cal.4th 894, 897–898 [exercising such discretion in SVPA appeal].) We recognize there is a distinct danger in SVPA cases that subsequent proceedings will render an

[4] We also take judicial notice of the remaining publicly available records in the proceeding on the subsequent petition for conditional release. (*People v. Johnson* (Super. Ct. San Mateo County, 2019, No. 18-CIV-01092.)

appeal moot, given the relatively tight statutory timeframe under which an SVP has a right to file a new petition for conditional release one year after a previous petition is denied. But Johnson's claims are primarily fact-based, turning on the evidence presented of his dangerousness at a particular time, nearly two years ago, and as such they do not present issues of broad public interest. And to the extent he raises issues of wider concern, he does not explain why they would not be adequately and more effectively litigated in a case in which the person committed under the SVPA had not obtained a conditional release. We therefore decline to address Johnson's claims on their merits.

III.
DISPOSITION

The appeal is dismissed.

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Humes, P.J.

WE CONCUR:

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Margulies, J.

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Sanchez, J.

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